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Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Portals
Washington, DC 20554

Re: ***Unbundled Access to Network Elements*, WC Docket No. 04-313; *Review of Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers*, CC Docket No. 01-338**

I am writing to address various claims regarding the eligibility criteria that apply to the use of UNEs for the provision of long distance and other competitive services that competing carriers have recently made in *ex partes* filed in the above-referenced dockets.

1. As Verizon has explained, the *USTA II* court held that the impairment inquiry must take a "nuanced" approach that analyzes whether competition is impaired in "specific markets or market categories." 359 F.3d 554 at 574 (D.C. Cir. 2004) (citing *USTA I*, 290 F.3d 415 at 426 (D.C. Cir. 2002)). Under this approach, "competitors cannot generally be said to be impaired" in a particular market category or categories "where robust competition in the relevant market belies any suggestion that the lack of unbundling makes entry uneconomic." *USTA II*, 359 F.3d at 592; *accord id.* at 576. Thus, in all individual market categories where competition is possible without UNEs, including those categories where carriers are successful serving customers using special access, it is not only unnecessary, but counterproductive – and unlawful – for the Commission to permit competing carriers to use (or convert to) UNE-based alternatives.

As an initial matter, the Commission cannot permit carriers to convert existing special access circuits to UNE pricing. By definition, a "conversion" can occur only if the requesting carrier is *already* using special access to provide the services that it seeks to offer; otherwise, there would be nothing to convert. As the D.C. Circuit held, the Commission "must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired." *USTA II*, 359 F.3d at 577. And Verizon's data show that competing carriers have continued to use special access even when they had the opportunity to convert those circuits to UNEs – for example, after expiration of the one-to-three-month holding

period that applies to special access services.[1] In these circumstances, the sole effect of permitting competing carriers to convert their special access circuits to UNEs is a price break that increases the competing carrier's profits. But the Supreme Court has held that this is not a valid basis for an impairment finding. *See Iowa Utils. Bd.*, 525 U.S. 366 at 389-90 (1999).

Moreover, the fact that some carriers are competing successfully with special access suggests that other carriers can compete in the same manner and do not need access to individual high-capacity UNEs or EELs. Thus, wherever there is a building in which one or more competing carriers is successfully providing DS1 or DS3 service to customers using special access, no competing carrier can obtain new DS1 or DS3 UNEs – or convert existing DS1 or DS3 special access circuits to UNEs – to serve customers in that same building. As the D.C. Circuit held, the existence of competition to that building using special access "show[s] that lack of access to [UNEs] had not impaired CLECs," and other competitors must therefore be found to "be equally unimpaired going forward." *USTA II*, 359 F.3d at 593.

The Commission also must ensure that whatever limitations it adopts, both with respect to limits on conversions and eligibility rules to obtain access to UNEs going forward, apply both to individual elements as well as to combinations of those elements in the form of EELs.[2] Where competing carriers have been successful without access to high-capacity UNEs, there is no basis to allow them access to those UNEs, regardless of whether they are provided on a stand-alone basis or combined. Otherwise, if the Commission were to allow competitive carriers to obtain access to individual elements such as high-capacity loops to use for services that already are competitive, then these carriers that have been using special access circuits for years to provide these services could convert the loop component of those services to UNE pricing. Likewise, they could add new circuits to provide these services by combining a UNE loop with special access transport even though they self-evidently are not impaired in their ability to provide those services. By subjecting part of those special access services to UNE pricing, the result would be to undermine existing competition for these services. *See Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8 at 16 (D.C. Cir. 2002).

In addition, going forward, carriers cannot be permitted to obtain access to UNEs for use to provide service in segments of the market that already are competitive and where there self-evidently is no impairment. Thus, the Commission may not permit competing carriers access

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[1] *See* Verses/Lataille/Jordan/Reney Decl. ¶ 59 & Exh. 10A, attached to Verizon Comments at Attachment B (corrected by Errata filed Dec. 7, 2004).

[2] *See* Ex Parte Letter from Andrew D. Lipman, *et al.*, Swidler Berlin Shereff Friedman, LLP, to Marlene Dortch, FCC, WC Docket No. 04-313 & CC Docket No. 01-338, at 2-4 (filed Nov. 18, 2004) (on behalf of Alpheus Communications, LP, ATX Communications, Inc., Covad Communications, CTC Communications Corp., Focal Communications Corp., Freedom Ring Communications, LLC, d/b/a Bay Ring, GlobalCom, Inc., Mpower Communications Corp., Ntelos, Inc., OneEighty Communications, Inc., RCN Telecom Services, Inc., and TDS Metrocom, LLC) ("Swidler 11/18/04 Ex Parte"); Ex Parte Letter from Praveen Goyal, Covad, to Marlene Dortch, FCC, WC Docket No. 04-313 & CC Docket No. 01-338, at 2 (filed Nov. 24, 2004) ("Covad 11/24/04 Ex Parte").

to UNEs with respect to wireless, long-distance, enterprise, or packet-switched broadband services.[3] For example, the record shows that wireless services are intensely competitive despite the fact that wireless carriers do not use UNEs.[4] The Commission accordingly cannot allow carriers to obtain UNEs for use in connection with wireless services. And just as wireless providers cannot obtain UNEs directly, the Commission should also make clear that CLECs cannot obtain UNEs and turn around and resell them to wireless carriers. The Commission also must adopt a similar rule with respect to other competitive services, such as long distance, for which there likewise can be no finding of impairment.

2. With respect to long-distance services in particular, the record demonstrates that these services are intensely competitive, and that they have become so without the use of UNEs.[5] Thus, the Commission must reform its existing eligibility criteria to ensure that they prevent carriers from using UNEs or EELs to provide long distance services. The Commission must accordingly do more than merely reinstate some version of its previous eligibility criteria, which had the very different purpose of merely ensuring that competing carriers were capable of providing local service. *See* Verizon Reply at 108-109. In this regard, although the Commission should continue to require CLECs to certify that they are using EELs and individual UNEs for local service, the Commission also must adopt meaningful tests to enforce this.[6]

a. With respect to its architectural criteria, the Commission should tighten the service criterion that requires a CLEC to maintain only one DS1 interconnection trunk for every 24 DS1 EELs that it serves, to require instead that a CLEC maintain at least one DS1 trunk for every five DS1 EELs, and that this trunk actually be used to carry traffic.[7] An increase in the ratio along these lines will help ensure that the facility in question is actually used in some substantial measure to provide local voice service. Although the Commission previously adopted a larger ratio, its rationale for doing so – that the question was only whether the

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[3] *See* Verizon Comments at 65-75; Verizon Reply at 100-105.

[4] *See USTA II*, 359 F.3d at 575-77; Verizon Comments at 71-73; Verizon Reply at 103-104.

[5] *See* Verizon Comments at 74-75; Verizon Reply at 104-105.

[6] While MCI has argued that mass-market customers are increasingly purchasing bundles of local and long-distance service, which "has substantially diminished the importance of stand-alone voice long distance services," that does not provide a basis to permit carriers to use UNEs for long distance or any other services that are part of such bundles. *See* Letter from R. Milkman, Lawler, Metzger & Milkman, to Marlene Dortch, FCC, WC Docket No. 04-313 & CC Docket No. 01-338 at 1 (filed Dec. 3, 2004). If anything, the rise of service bundles and the decline of the stand-alone long-distance market demonstrates that these services are growing even more competitive, and that UNEs may not be permitted to provide such services.

[7] A local interconnection trunk should not count for purposes of the EEL-to-trunk ratio if a Calling Party Number is not provided on calls delivered for termination by that trunk to an ILEC switch. Mixed-use trunks should count for this test only to the extent they are carrying a majority of local traffic. In addition, the Commission should not count one-way local interconnection trunks used by CLECs to terminate traffic with an ILEC, and should only assign half weight to two-way local interconnection trunks used for this purpose.

CLEC is a bona fide provider of local service, not whether the facility in question is used for that purpose – has been rejected along with the Commission's "qualifying services" test. *See USTA II*, 359 F.3d at 591-92. Moreover, the Commission adopted the 24-to-1 ratio based on the assumption that, although engineering principles dictate that one trunk is required for every five voice lines, only five out of every 24 circuits on a DS1 would be used for voice, with the rest used for data. *See Triennial Review Order,* 18 FCC Rcd 16978, ¶ 608 (2003). When a DS1 circuit is used exclusively to provide local voice services, however, there needs to be one DS1 interconnection trunk for every five voice circuits, which roughly translates into one DS1 interconnection trunk for every five DS1 EELs.

The fact that some circuits may be used for data does not warrant a different approach. In light of *USTA II* and the extensive competition for data services, it would be impermissible to allow UNEs, including EELs, to be used to provide data services. As an initial matter, there is no legitimate basis to distinguish these services from long distance service generally, as some CLECs argue.[8] The reality is that a large fraction of the long distance services that competing carriers provide *are* data services. For example, with respect to Frame Relay and ATM services – the two principal high-capacity data services used by business customers[9] – more than 80 percent of revenues are earned on the provision of these services on a long-distance basis, rather than on a local basis.[10]

Moreover, these and other data services that are provided over high-capacity facilities are subject to intense competition. Verizon has demonstrated that AT&T, MCI, and Sprint are the incumbents in this market; that these three carriers still account for nearly three-quarters of the market for Frame Relay and ATM services; and that they also are the major providers of other specialized high-speed data services provided to business customers, such as IP Virtual Private Network ("IP-VPN") services.[11] Many other CLECs provide ATM, Frame Relay, and IP-VPN services, as well.[12] Thus, as with respect to wireless services and long

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[8] *See* Ex Parte Letter from Praveen Goyal, Covad, *et al.*, to Marlene Dortch, FCC, WC Docket No. 04-313 & CC Docket No. 01-338 (filed Nov. 19, 2004) (on behalf of Covad Communications, PacWest Telecomm, Inc., Network Telephone, Lightship Telecom, and KMC Telecom) ("Covad et al. 11/19/04 Ex Parte"); *see also* Swidler 11/18/04 Ex Parte at 2-3; Covad 11/24/04 Ex Parte at 2.

[9] *See* M. Bowen, *et al.*, Schwab Soundview Capital Markets, *AT&T Corp.* at 2 (Jan. 21, 2004) ("ATM and frame relay services constitute the majority of telecom spending by businesses."); *UNE Fact Report 2004,* Prepared for and Submitted By BellSouth, SBC, Qwest and Verizon, WC Docket No. 04-313 & CC Docket No. 01-338, at III-33 (filed Oct. 4, 2004) ("2004 Fact Report").

[10] R. Kaplan, IDC, *U.S. ATM Services Forecast, 2002-2007* at Table 2 (Mar. 2003) (84 percent of ATM revenue is earned on long distance services ($3.014 billion) versus 16 percent on local services ($577 million)); R. Kaplan, IDC, *U.S. Frame Relay Services Forecast, 2002-2007* at Table 2 (Mar. 2003) (84 percent of Frame Relay revenue is earned on long distance services ($7.155 billion) versus 16 percent on local services ($1.317 billion)).

[11] *See* Verizon Comments at 67-68; Verizon Reply at 102; *2004 Fact Report* at III-32 to III-33.

[12] *See* Verizon Comments at 67-68, 69-70; Verizon Reply at 102; *2004 Fact Report* at III-33.

distance services generally, data services are subject to intense competition, and there is no basis for the Commission to find impairment with respect to these services.

Covad et al. argue that the "D.C. Circuit has not disturbed the Commission's inclusion of data telecommunications services, such as local data services, xDSL and high-capacity services, in the category of qualifying services." Covad et al. 11/19/04 *Ex Parte* at 3. As discussed above, however, the D.C. Circuit specifically instructed the court to conduct separate impairment analyses for relevant market categories. Thus, while Covad et al. argue that the Commission "should not take this occasion to create a new reviewable issue for the appeals court where there is currently none," they get things exactly backwards. *Id.* To the extent the Commission fails to heed the D.C. Circuit's holding that the Commission must conduct a separate impairment analysis for data services – or for any other competitive services – it will once again have to defend its failure to follow that approach before the court.

b. The Commission also should modify its architectural criteria in certain other respects to provide some meaningful level of assurance that individual circuits are used in some substantial measure to provide local services. The Commission should require that there be an identified local telephone number for each DS1 of capacity ordered. The Commission also should require that each of those circuits connect to a switch capable of providing local voice service. The Commission should further require that a competing carrier obtain collocation in each of the individual wire centers where it is obtaining one of these circuits.[13]

Each of these requirements helps ensure that the facilities in question are used in substantial part to provide local service. In order to provide local voice services over a circuit, competing carriers must connect that circuit to a switch capable of providing those services, and must obtain local telephone numbers. Given that these steps are a necessary prerequisite to providing local service, they are in no way onerous to a CLEC that seeks to use UNEs for that purpose. Likewise, the Commission has recognized that "collocation is a necessary building block for providing local voice services." *Triennial Review Order* ¶ 604. And CLECs that provide local service to end-user customers, typically obtain collocation in those customers' wire centers, so this requirement is likewise justified and in no way onerous to a CLEC that legitimately seeks to use UNEs or EELs to provide local services.

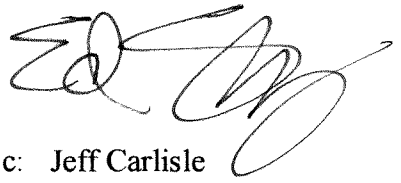
[13] The Commission should also clarify that collocation is limited to actual collocation, not so-called "reverse" collocation. ILECs have sought reverse collocation from CLECs in order to avoid paying inflated rates to the CLECs for access facilities – and CLECs have denied those requests virtually across the board. Consequently, CLECs could contend that ILECs have "agreed to" reverse collocation anywhere and everywhere. In no sense, however, would this show that the CLEC is using EELs for a significant amount of local traffic, particularly since reverse collocation would most likely be used by the ILEC to terminate *its* traffic to the CLEC, and not the other way around.

c. Critically, the Commission also should require that when a CLEC orders high-capacity UNEs or EELs that it provide information with its order regarding the local telephone number assigned to each circuit, the interconnection trunk identification number, the local switch CLLI code to which the circuit is attached, and the collocation terminating connecting facility assignment. These requirements will help obviate the need for expensive and intrusive audits while at the same time assuring that carriers use UNEs only for the services for which the Commission has found impairment. Moreover, such requirements are not burdensome, because CLECs should maintain all the information they need to certify that they meet the relevant criteria. In addition, given that UNEs are typically ordered electronically, it will be possible to work out a method for competing carriers to provide the necessary information simply by populating fields on an order form.

The Commission also should require competing carriers to provide officer-level certifications that the information they provide in order to obtain UNEs is true and correct. Such certifications need not disrupt electronic orders and could be confirmed by a check-off box on the order form (with a more generalized certification separately provided to support multiple orders). Competing carriers should likewise be required to make certifications that their embedded based of UNEs meet the relevant eligibility criteria as well, and the Commission should establish a time limit for carriers to provide such certifications. Requiring officer-level certifications with respect to new and existing UNEs will further help in reducing costly audits and ensuring that competing carriers are using UNEs only for their intended purpose.[14]

Please place this letter in the record of the above proceedings.

Sincerely,



c: Jeff Carlisle
Michelle Carey
Tom Navin
Pam Arluk
Gail Cohen
Ian Dillner
Russ Hanser
Marcus Maher
Jeremy Miller
Carol Simpson
Tim Stelzig

[14] To the extent that the Commission determines that a competing carrier has provided false information, that carrier should be required to pay the special access price for the UNEs it ordered, in addition to whatever penalties apply under the Commission's rules.